

LABOR AND THE COURTS

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To secure social peace is one of the primary objects of law. There can be no enduring social peace without a generally prevailing belief that all alike may obtain the same measure of justice in the courts. Whether justified or not, a sustained sense of unfair treatment by the courts on the part of any vital, producing group in the community is a danger of first magnitude.

The signs are all about us that labor groups throughout the country are smarting with a sense of injustice at the hands of the courts. Their faith in law and their respect for the courts are growing less and less every year. The situation calls for constructive efforts to meet the growing danger, not only on the part of labor leaders, but on the part of all who believe in American law and American traditions.

It is the fashion to concentrate attack upon the "labor injunction." There can be no question but that in the issue of labor injunctions many courts have abused their powers. Not only have sweeping injunctions couched in all-inclusive terms been improvidently granted, only to be vacated by higher courts after they have served the complainants' purposes, but the injunction method itself as applied to labor controversies is open to serious question. For in the field of labor disputes where two groups, acting collectively, are pitted against each other in a sharp struggle for supremacy, the situation often reminds one of the German advance upon Paris in 1914. Time is of the essence. Delay is defeat. A strike organization falls to pieces through mere delay and inaction. In such a case the issue of a temporary injunction or restraining order commonly results, not, as in ordinary cases, in maintaining the status quo and thus preventing irreparable injury until a more thorough examination of the issues can be made, but in virtually awarding victory in advance by tying the hands of the defendants during the critical moments of the struggle. A legal machinery which casts upon a single judge the duty of awarding victory and deciding issues of tremendous social import, not as a result of a painstaking examination but upon the hazard of mere affidavits or upon a hurried preliminary hearing, is not a procedure altogether fitted to achieve social justice.

Quite naturally, therefore, in view of the widespread use and abuse of injunctions in labor disputes, most of the constructive efforts of the day to safeguard labor from legal injustice are

concentrated upon curbing the abuses of the labor injunction. That part of the Clayton Act which assumed most importance in the eyes of labor was Section 20 which pertains to the issue of injunctions. The proposed Shipstead Act is essentially an anti-injunction bill.¹ The injunction is made the scapegoat for all of labor's wrongs; and laboring men have come to believe that once this evil is done away with, they may expect a new order and a new judicial day.

But it is a serious question whether the importance, great as it is, of the injunction in the field of labor law is not being unduly magnified to the neglect of other sources of legal injustice. May there not be positive danger in this over-exaggeration because of the later disillusionment which must be the inevitable aftermath of such beliefs as are now being nourished in the effort to pass anti-injunction legislation? If labor groups are taught to believe that salvation will come with the enactment of the Shipstead bill,² that freed from the danger of injunctions they may expect a new or different treatment at the hands of the courts and the end of harsh legal restraint, the disillusionment will be bitter. Damage suits can bite even deeper than injunction suits; the *Danbury Hatters* case³ and the *Coronado* cases⁴ were suits in which no injunctions were asked or given. Never has labor been treated by the courts in a more oppressive way than in England during the eighteenth and nineteenth centuries, at a time when the use of the injunction remedy in labor disputes was unknown. Many of the American cases of the first half of the nineteenth century, when labor injunctions were still unthought of, tell the same tale. The injunction, after all, is only a particular form of remedy. If legal injustice exists, the abolition of the injunction will surely not end it, but only compel it to find expression in other channels.

¹ The proposed Shipstead bill, as drafted by the Sub-committee of the Senate Committee on Judiciary, was designed to prevent abuses in the issue of injunctions, although two of its sections (§§ 3, 6) relate to changes in the substantive law.

For the text of the proposed bill, see FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 279-288; Frankfurter and Greene, *Labor Injunctions and Federal Legislation* (1929) 42 HARV. L. REV. 766, 795-799.

² In the last (1929) Annual Convention of the American Federation of Labor, the committee appointed to study the proposed Shipstead bill, in recommending its enactment with certain amendments, said:

"It is with the further consideration and approval of the Executive Council we herewith submit for your approval a legislative proposal which it is firmly believed . . . will establish that equality of freedom in our industrial life and industrial relations as to accord to the wage earners of America full protection of and in their rights. . . ."

³ *Loewe v. Lawlor*, 203 U. S. 274, 28 Sup. Ct. 301 (1908).

⁴ *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 587 (1922); *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 Sup. Ct. 551 (1925).

There seems to be a misconception, fairly widespread among those without legal training, that the granting of injunctions depends entirely upon the personal discretion of the individual judge,⁵ and that if the restraining of certain conduct by injunction can be prohibited, such conduct will thereby become legalized and permitted. Hence the exaggerated importance of anti-injunction legislation. Such a notion every lawyer would at once disclaim; but few trade unionists are lawyers. To the lawyer it is elementary that no activity can be enjoined which is not illegal, either in and of itself or as part of a larger illegal whole⁶; that to enjoin strikes or other union activities which are not of themselves illegal is as unlawful today as it would be under the Shipstead or any other anti-injunction legislation. To legalize the strike would be a far more effective and serviceable measure in the interest of labor than to forbid the use of a strike injunction. The cure, to be effective, must go to the root, and not simply to the legal remedy.

When the attempt is made to formulate a concrete program based upon these ideas the extreme complexity of the subject becomes apparent. Nevertheless, if labor is to have adequate legislative protection this problem must be faced. Out of the complexity will slowly emerge a growing realization that labor needs legislative protection against injustice in certain, well defined fields of substantive law, as well as against abuses in the use of the injunction remedy. It is impossible within the limits of a brief paper to explore these fields with any kind of thoroughness. But a few brief suggestions relating to several distinct phases of the problem will help to make the matter concrete.

CONSPIRACY

Because of its vague and elastic limits the crime of conspiracy⁷ has often been seized upon by reactionary courts as a convenient means whereby to reach desired convictions of groups or combinations whose activities were felt to be oppressive but could not be brought within the precise limits of definite crimes. Since mere combination or concerted action is mani-

⁵ Instances of this are to be found on every hand. Compare the following quotation from the American Federation of Labor Weekly News Service, Aug. 17, 1929: "The labor injunction is a strike-breaking weapon. It is another name for one-man government that this country rejected when it repudiated the kingly theory."

⁶ As to the few exceptional cases where injunctions may be obtained although there could be no suit for damages, see Chafee, *Does Equity Follow the Law of Torts* (1926), 75 U. OF PA. L. REV. 1. These exceptional situations, if they exist, bear little relation to the subject under discussion.

⁷ As to the crime of conspiracy, see Sayre, *Criminal Conspiracy* (1922) 35 HARV. L. REV. 393.

festly not in and of itself criminal, the crime of conspiracy, it would seem, must require proof that either the ends pursued or the means to be utilized are of themselves criminal. It is quite true that non-criminal activity may become criminal by force of mere numbers, as in the common law crimes of riot or unlawful assembly, which require at least three people.⁸ Nevertheless, if the unlawful assembling of two people is not criminal, conspiring to assemble two people should not constitute a crime. If neither the objects sought nor the means to be used are themselves criminal, how can the mere conspiring to attain non-criminal results be criminal? But, unfortunately, courts have not always confined the crime within these logical limits; it is commonly said that a conspiring to attain any unlawful, even though not criminal, end, or to use any unlawful, even though not criminal, means, constitutes criminal conspiracy.⁹ Some courts have gone even further and hold that a conspiracy is criminal if its object be merely immoral or *contra bonos mores*.¹⁰ So loosely and vaguely has the crime been defined that the way has been opened for judges to convict defendants acting in combination who concededly have violated and contemplate violating no pre-established law but whose activity offends the innate prejudices of the individual judge. In the *Philadelphia Cordwainers'* case,¹¹ the court held it a criminal conspiracy for employees in combination to refuse to work except for higher wages. When employees later sought to invoke the same doctrine against their employers combining to depress wages, they were told that "a combination to resist oppression not merely supposed but real, would be perfectly innocent; for where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy"; and the court refused to convict the employers unless they could be proved "to have been actuated by an improper motive."¹² Similarly, in the later New Jersey case of *State v.*

⁸ 4 BL. COMM. *146.

⁹ See statements and cases cited in 2 BISHOP, NEW CRIMINAL LAW (1923) § 181; 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §§ 1600 *et seq.*; 8 CYO. 623; 12 C. J. 548.

¹⁰ See, for instance, *State v. Burnham*, 15 N. H. 396 (1844), where Gilchrist, J., said:

"When it is said in the books that the means must be unlawful, it is not to be understood that those means must amount to indictable offences, in order to make the offence of conspiracy complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offence consist." *Ibid.* 403.

¹¹ 3 COMMONS AND GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1926) 59-248; SAYRE, COLLECTION OF CASES ON LABOR LAW (1922) 99. The case was decided in 1806.

¹² *Commonwealth v. Carlisle*, Bright. 36 (Pa. 1821). It is interesting

Donaldson,¹³ where the defendant employees were indicted for conspiracy because they had notified their employer that they would cease working for him unless he discharged certain non-union employees, the court, although it could find criminality neither in the ends pursued nor in the means utilized, nevertheless convicted the defendants, and declared: "It may safely be said, nevertheless, that a combination will be an indictable conspiracy . . . where the confederacy, having no lawful aim, tends simply to the oppression of individuals."¹⁴

It was chiefly this vague and ill defined doctrine of conspiracy to which English courts resorted in their oppressive and harassing treatment of labor groups during the eighteenth and nineteenth centuries.¹⁵ As long as the doctrine of criminal conspiracy remains undefined, there will always be a danger of courts being invoked, especially during periods of reaction, to punish as criminal associations and groups which for the time being are unpopular or stir the prejudices of those in power. Although this danger may be dormant as long as other equally vague doctrines or laws are available, such as restraint of trade or the Sherman Act, it is nevertheless real, and should be met by affirmative legislation.

The abuse of the doctrine by English courts in the field of labor law became so great during the nineteenth century that England passed the Conspiracy Act of 1875,¹⁶ providing that:

" . . . an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such an act committed by one person would not be punishable as a crime."¹⁷

The tort of civil conspiracy lends itself to very much the same kind of abuse. If once the courts hold that the tort includes concerted action tending "simply to the oppression of individuals," no group whose sphere of activity happens to lie in fields

that this case was decided in the same state as the Philadelphia Cordwainers' case.

¹³ 32 N. J. L. 151 (1867).

¹⁴ The court concludes by saying: "In my opinion this indictment sufficiently shows that the force of the confederates was brought to bear upon their employer for the purpose of oppression and mischief, and that this amounts to a conspiracy." *Ibid.* 156.

¹⁵ See 3 STEPHEN, *HISTORY OF CRIMINAL LAW* (1883) 203 *et seq.*; DICEY, *LAW AND OPINION IN ENGLAND* (1905) 96-97; SIDNEY AND BEATRICE WEBB, *HISTORY OF TRADE UNIONISM* (1920).

¹⁶ 38 & 39 VICT. c. 86, § 3 (1875).

¹⁷ As to this legislation, see 3 STEPHEN, *op. cit. supra* note 15, at 225-226; DICEY, *op. cit. supra* note 15, at 267-272; SIDNEY AND BEATRICE WEBB, *op. cit. supra* note 15, at 291 *et seq.*

where prejudice runs high will be free from the danger of damage or injunction suits whose outcome will be left very largely to the economic and social views of individual judges.¹⁸ It was the abuse by English courts of the doctrine of civil conspiracy which led to the English legislation of 1906, providing that:

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."¹⁹

In the absence of legislative safeguards, reactionary courts through the doctrine of criminal or civil conspiracy will always be provided with a means for curbing the otherwise lawful activities of labor unions.²⁰

¹⁸ Writing of the use of the doctrine of civil conspiracy in English courts, Sidney and Beatrice Webb in their *History of Trade Unionism* say:

"The Trade Unions in 1875-80, though . . . warned by their friendly legal advisers, had not realised the importance of insisting that the elastic and indeterminable law of conspiracy should be put on a reasonable footing; and though they were, by 1891, fairly safe from its use to reinforce the criminal law, the lawyers found means, under the figment of 'conspiracy to injure,' to bring under the head of torts or actionable wrongs the most ordinary and non-criminal acts of Trade Union officers which would have been, if done by one person only, without conspiracy, no ground for legal proceedings. After-ages will be amazed at the flagrant unfairness with which the conception of a 'conspiracy to injure,' was applied at the close of the nineteenth century." *Ibid.* 597-598.

¹⁹ 6 EDW. VII, c. 47, § 1 (1906). See SIDNEY AND BEATRICE WEBB, *op. cit. supra* note 15, at 607 *et seq.*

²⁰ The cases in which the doctrine of criminal conspiracy has been applied in labor cases are too numerous to cite. See OAKES, *LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS* (1927) Index, tit. "Criminal Conspiracy" and references cited. A typical statement of current doctrine may be found in *State v. Stewart*, 59 Vt. 273, 9 Atl. 559 (1887), where Powers, J., said:

"The principle upon which the cases, English and American, proceed, is, that every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property. If men, by overt acts of violence, destroy either, they are guilty of crime. The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment on the

RESTRAINT OF TRADE

The common law doctrine of restraint of trade is even more shadowy and ill-defined than the doctrine of conspiracy. Countless activities which in fact restrain trade are entirely legal. Because the line between those restraints which are legal and those which are illegal is so vague as to be almost invisible, the doctrine of illegal restraint of trade, like that of conspiracy, can in the absence of legislative safeguards always be utilized to defeat the otherwise lawful activities of trade unions.

That such a possibility is not an idle one seems clear from the experience of England. After the repeal of the English Combination Acts in 1824 and 1825 every one supposed that the legality of trade unions, existing to secure higher wages or shorter working hours, was established in England beyond question or dispute. For almost half a century this was the universal assumption. But in 1867 the decision of *Hornby v. Close*²¹ burst like a bombshell upon the trade union world. In that decision the Court of Queen's Bench, seizing upon the common law doctrine of restraint of trade, decided that an ordinary trade union, existing to secure higher wages and shorter working hours, was illegal as in restraint of trade. "I am very far from saying," declared Cockburn, C.J., in deciding the case, "that the members of a trades' union constituted for such purposes would bring themselves within the criminal law; but the rules of such a society would certainly operate in restraint of trade, and would, therefore, in that sense, be unlawful." By this decision, which was followed and approved by later cases,²² the very existence of trade unions was declared illegal as in restraint of trade. "The hard-earned accumulations of the larger societies," wrote the Webbs, "by this time amounting to an aggregate of over a quarter of a million sterling, were at the mercy of their whole army of branch secretaries and treasurers, any one of whom might embezzle the funds with impunity."²³ To save the existence of the unions a parliamentary enactment protecting them from the doctrine of restraint of trade became imperative. The result was the English Act of 1871, providing that:

"... the purposes of any trade union shall not by reason

ground that the state itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace, and general prosperity of the state are directly involved in the question." *Ibid.* 289, 9 Atl. at 568.

²¹ L. R. 2 Q. B. 153 (1867).

²² See, for instance, *Rigby v. Connol*, L. R. 14 Ch. D. 482 (1880).

²³ SIDNEY AND BEATRICE WEBB, *op. cit. supra* note 15, at 263.

merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."²⁴

In the United States we have no such legislation.²⁵ American state courts could conceivably at any time overrule former decisions and declare the existence of trade unions illegal as in restraint of trade. At least one court did so, and ordered the trade union dissolved.²⁶ Fortunately, however, this case is not representative of the American law.²⁷ Although the English decision of *Hornby v. Close* has never been accepted as law in the United States, and in view of the far reaching effects of such a decision probably never will be, it is not beyond the bounds of possibility that the doctrine might be accepted in a modified form. Just as under the Sherman Law combinations in restraint of trade have been held illegal if they can be shown guilty of "unfair," although not of themselves illegal, practices, so some have argued that trade unions should be held illegal if they can be shown guilty of "unfair," although admittedly not illegal, practices.

In a word, in American law the restraint of trade doctrine is rather a possible danger than a present source of injustice. But in one of its manifestations the doctrine is a source of acute present concern to laboring groups. The Sherman Anti-Trust Act prohibits contracts, combinations and conspiracies in restraint of trade or commerce among the several states. Although the Clayton Act declares that "nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations,"²⁸ neither the Sherman Act nor the Clayton Act prevents the federal courts from declaring illegal as in restraint of trade the *activities* of labor unions; and this is being done by federal courts in increasing measure.

Although, as its name indicates, the Sherman Anti-Trust Act was originally passed primarily to curb the evils of trusts and massed combinations of capital, it is being used today more and more as a weapon against combinations of laboring groups. The

²⁴ 34 & 35 VICT. c. 31, §§ 2, 3. As to this legislation, see STEPHEN, *op. cit. supra* note 15, at 224 *et seq.*; SIDNEY AND BEATRICE WEBB, *op. cit. supra* note 15, at 276 *et seq.*

²⁵ Section 6 of the Clayton Act is applicable only to the federal anti-trust laws, and does not cover the common law doctrine of restraint of trade. Furthermore, it is not, of course, applicable to proceedings in state courts.

²⁶ *Kealey v. Faulkner*, 18 Ohio Dec. 498 (1907).

²⁷ The American law may be found in such cases as *Snow v. Wheeler*, 113 Mass. 179 (1873).

²⁸ Section 6.

entering wedge was driven in the famous *Danbury Hatter's* case,²⁹ when union activities which would probably have been held illegal under the state law as constituting a secondary boycott were held to be illegal under the federal law as constituting restraint of trade among the several states under the Sherman Anti-Trust Act. Later, in 1921 in the case of *Duplex Printing Press Co. v. Deering*,³⁰ the Supreme Court held illegal as in restraint of trade under the Sherman Act union activities which under the law of the state where they took place were not illegal.³¹ In the second *Coronado Coal Co.* case,³² decided in 1925, the Supreme Court held that the activities of a local union in organizing and conducting with violence a strike against a non-union mine constituted a restraint of trade and commerce, and that the defendant union was therefore liable under the Sherman Act to threefold damages. Finally, in *United States v. Brims*³³ and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*,³⁴ decided in 1926 and 1927, the doctrine of the *Duplex* case was pushed still further; union regulations forbidding union members to work on materials produced by non-union men were held illegal as in restraint of trade among the several states and therefore prohibited under the Sherman Act. Yet when the reverse situation presented itself in the case of *Industrial Association of San Francisco v. United States*,³⁵ and union men sought to have certain building contractors and dealers in building materials enjoined from combining to limit sales of materials to employers pursuing an open shop policy, the injunction was refused upon the ground that this did not constitute illegal restraint of trade and commerce among the several states. Many acute thinkers have been unable to discover any substantial difference in principle between the *Brims* case and the *Bedford Cut Stone* case on the one hand, and the *San Francisco Industrial Association* case on the other. The truth of the matter seems to be that under recent interpretations of the Sherman and Clayton Acts the limits of what constitutes restraint of trade and commerce among the several states are even more illusory than those of the common law doctrine; as a result, decisions under the Sherman Act especially in the field of labor law have come to depend very largely upon the underlying philosophies and social beliefs of individual judges. In a field where the issues are of profound importance

²⁹ *Loewe v. Lawlor*, *supra* note 3.

³⁰ 254 U. S. 443, 41 Sup. Ct. 172 (1921).

³¹ See remarks of Brandeis, J., *ibid* 483, 41 Sup. Ct. at 182.

³² *Coronado Coal Co. v. United Mine Workers*, *supra* note 4.

³³ 272 U. S. 549, 47 Sup. Ct. 169 (1926).

³⁴ 274 U. S. 37, 47 Sup. Ct. 522 (1927).

³⁵ 268 U. S. 64, 45 Sup. Ct. 403 (1925).

as between nation-wide class-conscious groups, it is vital that the law be sufficiently definite to be capable of formulation by the courts and of comprehension by all parties concerned. It is high time that the anti-trust laws, designed to prevent the monopolization of trade, should be amended so as to prevent their being utilized as a weapon for attack upon the principle of collective bargaining. Here again is a situation where the need of legislative safeguards in the field of substantive law is imperative.

INDUCING BREACH OF CONTRACT

The doctrine which is being utilized to-day in American courts perhaps more extensively than any other as a weapon of attack upon labor groups is that of inducing a breach of contract.³⁶ This doctrine did not originate until 1853,³⁷ and it was not until almost the end of the nineteenth century that courts recognized inducing breach of contract as a general tort. Today most jurisdictions hold that "maliciously" to induce another to break a binding contract constitutes a tort, and as such gives rise to a suit for damages or for an injunction.³⁸

But no courts have yet been able to agree on any definition of what is meant by "maliciously." It is clear that not *every* inducing of a breach of contract is actionable; for instance, the superintendent of a soldiers' home, who after discovering that a contract has been entered into between a saloon-keeper and an inmate to furnish the inmate with a monthly supply of liquor at a given price prevents the execution of the contract, surely

³⁶ For a discussion of the tort of inducing breach of contract, see Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663; Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728.

³⁷ The doctrine originated with the case of *Lumley v. Gye*, 2 E. & B. 216 (1853).

³⁸ The courts of a few American states still deny the existence of such a doctrine. See, for example, *Boyson v. Thorn*, 98 Cal. 573, 33 Pac. 492 (1893); *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57 (1891); *Boulier v. Macauley*, 91 Ky. 135, 15 S. W. 60 (1891); *Swain v. Johnson*, 151 N. C. 93, 65 S. E. 619 (1909); *Sleeper v. Baker*, 22 N. D. 386, 134 N. W. 716 (1911); cf. *Glencoe Land & Gravel Co. v. Hudson Bros. Comm. Co.*, 138 Mo. 439, 40 S. W. 93 (1897) (doctrine rejected except where the relation of master and servant exists); *Kline v. Eubanks*, 109 La. 241, 33 So. 211 (1902); *McCann v. Wolff*, 28 Mo. App. 447 (1888); *Banks v. Eastern Ry. & Lumber Co.*, 46 Wash. 610, 90 Pac. 1048 (1907). The earlier position of the New York courts, at first expressly rejecting the doctrine of *Lumley v. Gye*, has been materially modified by later cases. As illustrative of the present attitude, see *Posner Co. v. Jackson*, 223 N. Y. 325, 119 N. E. 573 (1918); *Lamb v. Cheney*, 227 N. Y. 418, 125 N. E. 817 (1920). The earlier New York doctrine may be found in such cases as *Daly v. Cornwell*, 34 App. Div. 27, 54 N. Y. Supp. 107 (2d Dep't 1898); *De Jong v. Behrman Co.*, 148 App. Div. 37, 131 N. Y. Supp. 1083 (1st Dep't 1911).

does not subject himself to damages thereby³⁹ any more than the employer who by setting a higher wage scale in his factory because he believes sound business requires a living wage causes employees, in order to gain the higher wage, to break their contracts of employment with a rival employer. Courts agree that until "malice" is proved there is no tort; but since the conception of "malice" is as vague and undefined as it can be, here again is a legal doctrine which, like that of conspiracy or restraint of trade, allows courts unconsciously to reach decisions widely varying according to the personal bias or social viewpoint of the individual judge.

Many courts are defining "malice" as "lack of justification";⁴⁰ but this is only a restatement of the difficulty in other words. What constitutes "justification"? The tort of inducing a breach of contract was created to afford legal protection to the interest of promised advantages as against people other than the promisee; and the fundamental difficulty in defining "malice" or "justification" in connection with this tort is the fact that the plaintiff's interest of promised advantages with peculiar frequency comes into direct conflict with interests of others which the law also undertakes to secure. When this conflict occurs one or the other of the opposing interests must give way; which one it will be must depend in the last analysis upon a nice balancing of the interests concerned. There is no other way. No rigid formula or precise definition can possibly spell out the solution; the actual decision must inescapably depend upon policy.

It was this problem which underlay the famous and much discussed *Hitchman* case,⁴¹ decided by the Supreme Court in 1917. The plaintiff company owning and operating a coal mine on a non-union basis engaged employees only upon the understanding that "if any man wanted to become a member of [the United Mine Workers of America] he was at liberty to do so, but he could not be a member of it and remain in the employ of the Hitchman Company." One of the defendants, an agent of the United Mine Workers, was sent into the Panhandle District of West Virginia, where the plaintiff's mine was located, to unionize the Panhandle District mines, since these were running in direct competition with those of the unionized "Central Competitive Field," and underselling coal produced in the latter district. Upon the defendant's seeking to enroll the plaintiff's employees as members of the United Mine Workers, the plaintiff company sought and obtained an injunction restraining the

³⁹ Cf. *Rowan v. Butler*, 171 Ind. 28, 85 N. E. 714 (1908).

⁴⁰ See, for instance, *South Wales Miners' Fed. v. Glamorgan Coal Co.*, [1905] A. C. 239.

⁴¹ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

defendants from "interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mine. . . ."

The exact basis of the decision has never been explained.⁴² If the decision rests upon the tort of maliciously inducing a breach of contract, wherein lay the necessary "malice"? Very clearly there was no personal malevolence or ill will on the part of the defendants towards the plaintiff. If the bitter competition of the non-union mines with the union mines could not be ended, the union mines must close down and the United Mine Workers lose their employment. In the effort to save their economic existence they sought as their only remedy in the competitive warfare the unionization of the plaintiff's mines. Freedom to act in trade competition constituted a very genuine interest on the part of the defendants, and one which in the absence of the use of illegal means courts generally undertake to protect;⁴³ in direct conflict with this was the plaintiff's interest in its promised advantages. The balancing of these interests clearly depended upon a large question of policy; yet Mr. Justice Pitney, who wrote the majority opinion, so far as his language shows, apparently based the decision upon the simple fact that the defendants with knowledge induced the plaintiff's employees to break their individual contracts. To find the solution of legal and social problems as momentous and complex as that involved in the *Hitchman* case by a mere rule of thumb that the defendant induced a breach of the plaintiff's contract is completely to lose sight of the fundamental issues involved.⁴⁴

Seizing upon the *Hitchman* decision, employers have found an effective way to prevent peaceful and otherwise lawful union activities by requiring present or prospective employees as the price of employment to sign individual contracts against joining any union. Thus entrenched, they are in a position to defy every effort on the part of the unions to unionize their plants,

⁴² It is impossible to tell from the language of the majority opinion what was the basis of the decision. In the mind of Mr. Chief Justice Taft it was apparently deception and misrepresentation. See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 211, 42 Sup. Ct. 72, 79 (1921). If deceit was the real basis of the decision it is unfortunate that the majority opinion did not make this clear or indicate what kind of deceit or fraud will constitute a basis for such an action. See Sayre, *op. cit. supra* note 36, at 692, n. 81.

⁴³ See the remarks of Bowen, L. J., in the *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. D. 598 (1889), *aff'd*, [1892] A. C. 25; *cf. Sorrell v. Smith*, [1925] A. C. 700.

⁴⁴ For a further discussion of the *Hitchman* case, see Cook, *Privileges of Labor Unions in the Struggle for Life* (1918) 27 YALE L. J. 779; Sayre, *op. cit. supra* note 36, at 690 *et seq.*; *cf. Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928); Note (1928) 41 HARV. L. REV. 770.

and by a system of strategic individual contracts with their employees they are able in many cases to prevent unions entering into a competitive struggle with them over the price of labor.⁴⁵ That courts would refuse in fields other than labor law to allow competition to be effectually stifled by means of strategic contracts with third parties seems clear. As declared in the case of *Citizens' Light, Heat & Power Co. v. Montgomery Light and Water Power Co.*,⁴⁶

"... the trader who has made a contract with another person has a right, which the law will protect, to have that other keep it. Other traders have the correlative right to solicit the custom to which the contract relates. Whatever damage results to the first trader by the mere solicitation is privileged, so far as the solicitor is concerned, in the interest of proper freedom of competition. Were the law otherwise, the first person occupying the field of public service in many localities, by procuring long contracts to take water, light, and the like from him, might entrench himself in a monopoly there for years, because another thereafter could not solicit customers, thus bound, to change their patronage to him, and thereby enable a rival enterprise to enter the field."

It is the absence of any clear judicial formulation of what constitutes "malice" which leads different courts dealing with this tort to reach such varying results.

If labor is to safeguard its position it must secure protection against the abuse of a doctrine so ill-defined as that of inducing breach of contract. Some see the remedy, as in the proposed Shipstead bill,⁴⁷ in legislation making illegal all promises constituting or contained in contracts of employment between employer and employee whereby the employee agrees not to join a labor organization, or if he does join to withdraw from the employment relation.⁴⁸ If the employee's individual contract

⁴⁵ See Brief for Defendants in *Interborough Rapid Transit Co. v. Green*, published by Workers' Education Bureau Press, New York, 1928.

⁴⁶ 171 Fed. 553, 560-561 (C. C. M.D. Ala. 1909).

⁴⁷ See, for instance, § 3 of the amended draft of the proposed Shipstead Bill, as drafted by the Sub-committee of the Senate Committee on Judiciary. The weakness of the proposed legislation is that it fails to cover individual contracts between employer and employee relating to working conditions, shop regulations, etc.

⁴⁸ Arguments in support of such legislation are based upon analogies existing in other fields of law. For instance, because of the similar factual inequality which exists between railway companies and individual shippers, contracts whereby common carriers relieve themselves from liability for negligence or misconduct are even at common law held illegal as against public policy and void. On the other hand, in spite of this inequality, ordinary contracts of shipment entered into between the individual shipper and the carrier are valid.

Similar situations have been recognized in other fields of law where because of gross inequality of bargaining power courts have refused to

is made void, the inducing of its breach cannot be tortious, and no injunction or suit for damages can therefore be based upon it.

Others have proposed a more direct remedy. If the tort because of the inescapable vagueness of its limits is peculiarly liable to abuse in those fields where passion and prejudice run strongest, why not abolish the tort in those fields? Since the doctrine never existed prior to 1853 and was unknown in the field of labor disputes before the end of the last century, its abolition in labor cases could not work very serious harm; and as the abuse of the doctrine is almost wholly confined to labor cases, there is much to be said in favor of legislation providing for its complete abolition in the field of trade disputes.⁴⁹

PARTICULAR MEASURES UTILIZED IN LABOR DISPUTES

Strikes to Unionize a Shop

If social injustice is to be avoided, the legality of certain forms of collective bargaining frequently resorted to in the competitive struggle must be assured, irrespective of whether they are utilized by employers or employees. For instance, whether the concerted action takes the form of the strike or the lockout should make no difference as to its legality. Under present day law it is elementary that while some strikes are legal, others are illegal, and that the legality or illegality of the strike depends upon its purpose or object.⁵⁰ If, for instance, the object is to

lend their power to enforce certain kinds of contracts. Such situations include contracts between:

- (1) Lender and borrower of money.
- (2) Seller and buyer of property on credit.
- (3) Corporation and investor.
- (4) Fire insurance company and insured.
- (5) Life insurance company and insured.
- (6) Common carriers and their patrons.
- (7) Public utility companies and their customers.
- (8) Banks and depositors.
- (9) Surety companies and their customers.
- (10) Landlord and tenant.
- (11) Corporate seller and individual buyer of commodities.

As to the general subject, see Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454, 482 *et seq.* See cases collected in Brief for Defendants in *Interborough Rapid Transit Co. v. Green*, *supra* note 45, at 314-330.

⁴⁹ It was along this line that England sought the remedy. In the Trade Disputes Act of 1906 it is provided that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment. . . ." 6 EDW. VII, c. 47, § 3. As to the passage of this Act, see SIDNEY AND BEATRICE WEBB, *op. cit. supra* note 15, at 604 *et seq.*

⁵⁰ See *De Minico v. Craig*, 207 Mass. 593, 598, 94 N. E. 317, 319 (1911), where Loring, J., said: "Whether the purpose for which a strike is in-

secure higher wages or shorter working hours, although formerly such strikes were held illegal,⁵¹ today in every state of the Union they are held entirely legal. On the other hand, in the majority of states (although not in all), strikes to enforce secondary boycotts, or to compel employers to pay fines levied upon them by unions, or to exert political pressure, are generally held illegal. Courts are hopelessly divided as to whether a strike to unionize a shop or in pursuance thereof to compel the discharge of a non-union employee is legal or illegal. New York,⁵² Illinois,⁵³ California,⁵⁴ Minnesota,⁵⁵ and a substantial group of other states⁵⁶ hold such a strike legal. But there are important states, such as Massachusetts,⁵⁷ Pennsylvania,⁵⁸ and New Jersey,⁵⁹ which hold the strike to unionize a shop illegal.⁶⁰ The holding of such a strike illegal seems manifestly unjust. Under the existing law it is clear that employers have the unquestioned right, acting singly or in association, to discharge employees because they belong to a union. If the employers have this right, why should the employees not possess an exactly similar right, acting singly or in association, to cease working for an employer because he runs a non-union shop?⁶¹ In other

stituted is or is not a legal justification for it, is a question of law to be decided by the court. To justify interference with the rights of others the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference. To make a strike a legal strike it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a legal purpose for a strike. . . . "

⁵¹ Philadelphia Cordwainers' Case, *supra* note 11.

⁵² Nat'l Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902); Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

⁵³ Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389 (1912).

⁵⁴ Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908).

⁵⁵ Grant Construction Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N. W. 520, 1055 (1917); see Gray v. Bldg. Trades Council, 91 Minn. 171, 185, 97 N. W. 663, 668 (1903).

⁵⁶ See, as typical cases, Cohn & Roth Electric Co. v. Bricklayers' Union, 92 Conn. 161, 101 Atl. 659 (1917); Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907); Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367 (1895); State v. Employers of Labor, 102 Neb. 768, 774, 169 N. W. 717, 719 (1918); Roddy v. United Mine Workers, 41 Okla. 621, 139 Pac. 126 (1914).

⁵⁷ Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900).

⁵⁸ Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327 (1903); Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224 (1914).

⁵⁹ Ruddy v. Plumbers, 79 N. J. L. 467, 75 Atl. 742 (1910).

⁶⁰ If illegal, of course the strike can be enjoined and made the subject of heavy damage suits against the individual strikers, and their wages attached.

⁶¹ In the cases of Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908) and Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915), it

words, employees should be as free to strike as the employer is free, under the existing law, to discharge, in order to accomplish the unionization or the de-unionization of a shop, trade, or industry.

Since the right to demand exclusively union conditions lies at the very foundation of the principle of collective bargaining, the legality of the strike to unionize a shop must be of the largest concern to those seeking to uphold the principle of collective bargaining. In all those jurisdictions, therefore, where the strike to unionize a shop or to compel the discharge of a non-union employee is held illegal, legislation should be sought legalizing the strike or the trade agreement for such a purpose. In such cases the mere prohibition of an injunction suit as in the proposed Shipstead Bill will not afford adequate protection; for if the strike is illegal the prohibition of the injunction remedy will only increase the likelihood of heavy damage suits in which the wages and property of individual strikers may be attached.⁶² In New York, Illinois and other states, as well as in England, the courts without the aid of specific legislation have upheld the legality of the strike to unionize a shop; but in states like Massachusetts, where the courts have held such strikes illegal, legislation offers the only solution.⁶³

was held that the right of the employer to discharge employees for any or no reason is so sacred that a law making criminal the discharge of an employee because of his being a union man is unconstitutional. If the right of the employer to discharge for any reason or no reason was held by the United States to be so sacred that no state could pass a law infringing this constitutional right, it would seem that for the same reason the right of the employee to cease his work should be as sacred, and that his action should not be held illegal if the reason for his ceasing work along with other employees is to secure the exclusive employment of union men in a shop, trade, or industry. Indeed, this reasoning seems to be adopted by the United States Supreme Court in *Coppage v. Kansas*, *supra*. Mr. Justice Pitney, delivering the opinion of the Court in that case, said:

"Can it be doubted that a labor organization . . . has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union men?" *Ibid.* 19, 35 Sup. Ct. at 246. .

⁶² Cf. *Alden Bros. Co. v. Dunn*, 162 N. E. 773 (Mass. 1928).

⁶³ For the English rule upholding the legality of the strike, cf. *White v. Riley*, [1921] 1 Ch. 1; *Wolstenholme v. Ariss*, [1920] 2 Ch. 403.

Owing to such unfortunate decisions as *Plant v. Woods*, *supra* note 57, and subsequent decisions holding the strike to unionize a shop illegal, the law of Massachusetts as to the legality of strikes has been reduced to a state of chaos. Neither the Massachusetts courts nor any one else has been able to reconcile or adequately to explain such conflicting decisions as *Plant v. Woods* (strike to compel discharge of non-union painters held unlawful); *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906) (strike to compel discharge of painters so as to secure work for union bricklayers

The form which such legislation should take must depend upon the state of the substantive law in the particular jurisdiction concerned. A carefully framed bill was introduced into the Massachusetts legislature by the state branch of the American Federation of Labor in the winter of 1929, phrased as follows:

"Section 1. That the following purposes shall not be deemed to be against public policy nor shall they render unlawful otherwise lawful efforts directed toward their attainment:—

(a) Securing the exclusive employment of persons belonging or not belonging to any organization, association or union in any shop, trade or industry.

(b) Insisting that negotiations between employers and employees for the making or maintaining of trade agreements, for the arrangement of terms and conditions of employment or for the settlement of disputes, shall be carried on and concluded with those representatives of persons in any shop, trade or industry, designated in the manner that may be provided in their corporate organization or unincorporated association or by other means of collective action.

"Section 2. That no agreement between an employer or employers and employees or the representatives of any of them shall be deemed to be invalid or illegal because it provides for the exclusive employment in any shop, trade or industry, of persons belonging to any organization, association or union.

"Section 3. That no strike, lockout, or other concerted action of an otherwise lawful nature by employers or employees or the representatives of any of them for the purpose or purposes expressed in section one of this act or to secure or enforce an agreement falling within the terms of section two of this act shall be deemed illegal because of it being for such purpose or purposes.

"Section 4. That for the purposes of this act the expression 'employees' shall not be restricted to mean workers in the employ of a particular employer or employers, but shall include all

held lawful); *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457 (1908) (strike against the posting of open-shop rules held unlawful); *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036 (1911) (strike to compel discharge of a non-union unskilled assistant held lawful); *Haverhill Theatre v. Gillin*, 229 Mass. 413, 118 N. E. 671 (1918) (strike of union musicians to enforce a union regulation not to play for any employer employing non-union musicians held unlawful); *Shinsky v. O'Neil*, 232 Mass. 99, 121 N. E. 790 (1919) (concerted union efforts to compel discharge of a non-union employee in pursuance of a trade agreement for a closed shop held lawful); *Walton Lunch Co. v. Kearney*, 236 Mass. 310, 128 N. E. 429 (1920) (held, employer could not enjoin his employees from striking for a trade agreement embodying a union shop if he intentionally failed to keep an engagement to meet with the defendants); *Mechanics Foundry & Machine Co. v. Lynch*, 236 Mass. 504, 128 N. E. 877 (1920) (strike to compel employer to reemploy a certain union leader held unlawful); *Ryan v. Hayes*, 243 Mass. 168, 137 N. E. 344 (1922) (enforcement of trade agreement providing for the exclusive employment of union men held lawful).

persons who are or have been employed or who seek employment in any shop, trade or industry.

"Section 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of the act and application of such provisions as to other persons or circumstances shall not be affected thereby."

Boycotting

No part of the law is in a more formless or chaotic condition than the law of boycotts. There is no agreement among legal students or among the courts themselves as to exactly what constitutes a boycott or as to what boycotts, if any, are illegal.⁶⁴ So far as formulated doctrines are concerned, each judge is left too largely to his own innate feelings to determine the legality or illegality of any given boycott. Where an association of master plumbers passed a regulation that no member should purchase plumbing material from any wholesaler guilty of selling to non-members of the association, and a master plumber not a member of the association, facing ruin because of not being able to buy material, sought to enjoin the enforcement of the boycott, injunctive relief was denied on the ground that here

⁶⁴"The most casual observation will disclose that scarcely any two courts treating of the subject [*i.e.*, the boycott] formulate the same definition."—Per Halloway, J., in *Lindsay v. Montana Fed. of Labor*, 37 Mont. 264, 272, 96 Pac. 127, 129 (1908). "But the word [*i.e.*, boycott] is of vague signification, and no accurate and exclusive definition has, so far as I know, ever been given."—Per Hough, J., in *Gill Engraving Co. v. Doerr*, 214 Fed. 111, 118 (S. D. N. Y. 1914).

In *Mills v. United States Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185 (2d Dep't 1904), *aff'd*, 199 N. Y. 76, 92 N. E. 214 (1910), Jenks, J., said: "There is no commonly accepted definition of the verb. Some courts have defined it as necessarily implying violence, or intimidation, or the threat thereof; others as but necessarily implying abstention. A may refuse to trade with B unless B changes a certain policy, and A may think that his attitude is necessary for his own welfare and protection. It cannot be contended that A thereby offends the law. . . . Judge Cooley in his work on Torts (2d ed., p. 328) says: 'It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.' If A may take this step, it does not seem logical to hold that A and C together may not, and may not, by argument, persuasion and entreaty, bring D and E to their side." *Ibid.* 609, 91 N. Y. Supp. at 188.

Sir Charles Russel in his opening speech before the Parnell Commission said: "My lords, in this matter of boycotting, may I be forgiven for using the celebrated exclamation of Dr. Johnson, and say, 'Let us clear our minds of cant.' Boycotting has existed from the earliest times that human society existed. It is only a question of degree. Up to a certain point, boycotting is not only not criminal, but I say is justifiable and is right."

was no illegal boycott.⁶⁵ Other courts have similarly denied relief where secondary boycotts have been practiced as an incident in a competitive struggle waged by commercial associations.⁶⁶ But if an association of trade unionists enforce a regulation that no member shall work for any one who patronizes a non-union employer, an overwhelming majority of courts brand such conduct as an illegal boycott, and by reason of its illegality freely enjoin it.⁶⁷ Unfortunately, the courts have failed to point out any distinction between these two lines of cases; and the only substantial distinction apparent is that in the former, the defendants are merely commercial organizations, in the latter, labor organizations. Surely the law should be the same, irrespective of the character of the defendants.

Additional uncertainty arises from the distinction drawn between primary and secondary boycotts. A large majority of courts agree that the primary boycott is legal, and that the secondary boycott, if practiced by a labor group, is illegal. But among judges there is utter failure to agree on how to draw the line between the primary and the secondary boycott. If the law holding illegal a secondary boycott is to be justified, it must be upon the ground of protecting neutral third parties unconnected with the struggle from being coerced against their will to act so as to damage another. On the other hand, so long as no illegal end is pursued and no illegal means used, and so long as neutral third parties unconnected with the struggle are not coerced to take sides against their will, no law should prevent all having common interests or sympathies from acting in concert to promote their common cause.⁶⁸ Upon these

⁶⁵ *Macauley Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1 (1895).

⁶⁶ See, for instance, *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119 (1893); *Montgomery Ward v. South Dakota Ass'n*, 150 Fed. 413 (C. C. D. S. D. 1907); *Sorrell v. Smith*, *supra* note 43; cf. *Mogul Steamship Co. v. McGregor, Gow & Co.*, *supra* note 43.

⁶⁷ See, for instance, *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928 (1908); *Gray v. Bldg. Trades Council*, *supra* note 55; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (C. C. A. 8th, 1897), and a long line of similar decisions. On the other hand, some courts have held the secondary boycott even when practiced by labor groups legal. See, for instance, *Pierce v. Stablemen's Union*, *supra* note 54; cf. *Lindsay & Co. v. Montana Fed. of Labor*, *supra* note 64.

⁶⁸ As illustrative decisions to this effect, see *Mills v. United States Printing Co.*, *supra* note 64; *Kearney v. Lloyd*, L. R. Ireland, 26 Q. B. & Ex. Div. 268 (1890). In *Wilson v. Hey*, *supra* note 67, at 396, 83 N. E. at 929, Cartwright, J., delivering the majority opinion, said: "It is not wrong for members of a union to cease patronizing any one when they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person."

Scott and Farmer, JJ., in the same case, *ibid.* 399, 83 N. E. at 931 (dis-

fundamentals should be drawn the line between the "primary" and the "secondary" boycott;⁶⁹ and the "primary" boycott, *i.e.*, the withholding of labor or of patronage from one against whom an economic struggle is being waged without the coercion of any third party, entirely unconnected with the struggle, should be defined by legislation and declared not *per se* illegal. Under such legislation all having common interests in the competitive struggle, whether or not they happen to be in the same shop, trade, or industry, should be permitted to act collectively, so long as no illegal means are used, against all having opposing common interests.⁷⁰ No taint of illegality by reason of the boycott should attach unless the person against whom collective pressure is directly brought is shown to have no community of economic interest with the group against whom the economic struggle is waged and also shown to be not in competition with the boycotting group. Legislation such as this would of course legalize many so-called sympathetic strikes.⁷¹

Picketing

Picketing is another problem of substantive law calling for legislative action and clarification. Upon the question of the legality of picketing courts are also hopelessly divided. The majority hold that picketing is entirely lawful, so long as it is peaceful and does not in fact involve intimidation.⁷² A mi-

senting in respect to other points): "The law is that an individual may refrain from trading or dealing with any particular person, and that two or more individuals may agree among themselves that they will not trade or deal with a certain person, and may give notice to others that they have made such an agreement. (*Commonwealth v. Hunt*, 4 Metc. (Mass.) 111; *Bowen v. Matheson*, 14 Allen (Mass.) 499; *Macauley v. Tierney*, 19 R. I. 225, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119; *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190; *Longshore Printing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547; *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369; 18 Am. & Eng. Ency. of Law, 2d ed., p. 87). Appellants did nothing more."

In *Carew v. Rutherford*, 106 Mass. 1, 14, Chapman, C. J., said: "Every man has a right to . . . refuse to deal with any man or class of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions."

⁶⁹ This seems to be the line drawn by leading text writers. See MARTIN, *THE LAW OF LABOR UNIONS* (1910) § 71; CLARK, *THE LAW OF THE EMPLOYMENT OF LABOR* (1911) 289, 290. See, also, Brandeis, J., in *Truax v. Corrigan*, 257 U. S. 312, 364, 42 Sup. Ct. 124, 141, n. 28 (1921); *Mills v. United States Printing Co.*, *supra* note 64.

⁷⁰ Cf. § 9 (b) of the amended draft of the proposed Shipstead bill.

⁷¹ It is extremely doubtful whether as a matter of fact sympathetic strikes are actually prevented by the present "law in action."

⁷² *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. N. D. Ohio 1906); *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165

nority holds that there "can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."⁷³ When the question came before the United States Supreme Court,⁷⁴ the judges failed satisfactorily to settle this issue,⁷⁵ and the actual decision only

Ind. 421, 430, 431, 75 N. E. 877 (1905); *Jones v. Van Winkle Gin & Machine Works*, 131 Ga. 336, 340, 62 S. E. 236 (1908); *Steffes v. Motion Picture Union*, 136 Minn. 200, 161 N. W. 524 (1917); *Root v. Anderson*, 207 S. W. 255 (Mo. App. 1918); *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, 59 N. J. Eq. 49, 46 Atl. 208 (1899); *Fletcher Co. v. Int. Ass'n of Machinists*, 55 Atl. 1077 (N. J. Eq. 1903); *Reynolds v. Everett*, 17 N. Y. Supp. 264 (Sup. Ct. 1893), *aff'd*, 144 N. Y. 189, 39 N. E. 72 (1894); *Levy v. Rosenstein*, 66 N. Y. Supp. 101 (Sup. Ct. 1900); *Krebs v. Rosenstein*, 31 Misc. 661, 66 N. Y. Supp. 42 (Sup. Ct. 1900); *Foster v. Retail Clerks' Int. Prot. Ass'n*, 39 Misc. 48, 78 N. Y. Supp. 860 (Sup. Ct. 1902); *Mills v. U. S. Printing Co.*, *supra* note 64; *Searle Mfg. Co. v. Terry*, 56 Misc. 265, 106 N. Y. Supp. 438 (Sup. Ct. 1905); *Jones v. Maher*, 62 Misc. 388, 116 N. Y. Supp. 180 (Sup. Ct. 1909); *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. Supp. 195 (Sup. Ct. 1920); *McCormick v. Union*, 13 Ohio Cir. Ct. (N. S.) 545 (1911); *Greenfield v. Central Labor Council*, 192 Pac. 783 (Ore. 1920); *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 197, 53 S. E. 273 (1906); *Goldfield Consolidated Mining Co. v. Goldfield Miners' Union*, 159 Fed. 500, 521 (C. C. D. Nev., 1908); *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. 7th, 1908); *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851, 860 (S. D. Ohio 1917). See further cases cited in *Truax v. Corrigan*, *supra* note 69, at 365, n. 29, par. 2, 42 Sup. Ct. at 142.

⁷³ *Atchison, T. & S. F. Ry. v. Gee*, 139 Fed. 582 (C. C. S. D. Iowa 1905). *Accord*: *Pierce v. Stablemen's Union*, *supra* note 54; *Rosenberg v. Retail Clerks' Ass'n*, 27 Cal. App. Dec. 769 (1918); *Barnes v. Chicago Typographical Union*, 232 Ill. 424, 83 N. E. 932 (1908); *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176 (1906); *Lyon & Healy v. Piano*, etc. *Workers' Union*, 289 Ill. 176, 124 N. E. 443 (1919); *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896) (but *cf.* dissenting opinions); *Beck v. Ry. Teamsters' Union*, 118 Mich. 497, 77 N. W. 13 (1898); *Clarage v. Lufhringer*, 202 Mich. 612, 168 N. W. 440 (1918); *Jonas Glass Co. v. Glass Blowers' Ass'n*, 72 N. J. Eq. 653, 66 Atl. 953 (1907), *aff'd*, 77 N. J. Eq. 219, 79 Atl. 262 (1911); *Baldwin Lumber Co. v. Brotherhood of Teamsters*, 91 N. J. Eq. 240, 109 Atl. 147 (1920); *cf.* *Webb v. Cooks', etc. Union*, 205 S. W. 465 (Tex. Civ. App. 1918) (acts amounting to intimidation); *Baasch v. Cooks', etc. Union*, 99 Wash. 378, 169 Pac. 843 (1918).

⁷⁴ *American Steel Foundries v. Tri-City Central Trades Council*, *supra* note 42.

⁷⁵ This is so because, as evidenced by later remarks, the judges had widely differing ideas as to what constitutes "picketing." See *Truax v. Corrigan*, *supra* note 69, at 340, 42 Sup. Ct. at 132, where Taft, C. J., in speaking of the decision of *American Steel Foundries v. Tri-City Trades Council*, *supra* note 42, said: "We held that . . . picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms."

On the other hand, Brandeis, J., in the same case, also referring to the *Tri-City* decision, said: "This court has recently held that peaceful picketing is not unlawful." *Truax v. Corrigan*, *supra* note 69, at 371, 42 Sup. Ct. at 144.

served to create fresh problems. Mr. Chief Justice Taft, in rendering the opinion of the Court, broadly declared that labor unions had the unquestioned right of peaceful persuasion;⁷⁰ but by his limiting the unions to a single picket at each gate in a plant employing at the time some 350 men, the practical exercise of the right was very seriously curtailed if not denied. Just what the law covering picketing is today remains in the greatest uncertainty. It is vital to their growth and very existence that unions should have the right to extend their membership by peacefully persuading others to join their ranks; yet when it comes to the practical exercise of this right at critical moments, under the present uncertainty of the law no union can feel secure.⁷¹

The "Unfair List"

Under the existing common law, where not changed by statute, it is not unlawful for associations of employers to blacklist employees, *i. e.*, to circulate among themselves lists of employees under agreement that no employer member of the association shall give employment to a blacklisted employee.⁷² But when

⁷⁰ See *American Steel Foundries v. Tri-City Central Trades Council*, *supra* note 42, at 209, 42 Sup. Ct. at 78, where Taft, C. J., said: "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer . . . Union was essential to give laborers opportunity to deal on equality with their employer . . . The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious."

⁷¹ In England legislation was passed in 1906 (*Trade Disputes Act*, *supra* note 49, § 2) providing that ". . . it shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working." For former English legislation, see Acts of 6 Geo. IV, c. 129, § 3 (1825); 22 Vict. c. 34, § 1 (1859); 34 & 35 Vict. c. 32, § 1 (1871); and 38 & 39 Vict. c. 86, § 7 (1875).

⁷² *Boyer v. Western Union Tel. Co.*, 124 Fed. 246 (C. C. E. D. Mo. 1903); *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 S. E. 177 (1904); *Tilbury v. Oregon Stevedoring Co.*, 7 F. (2d) 1 (C. C. A. 9th, 1925).

employees similarly seek to circulate an "unfair list," containing the names of employers whom trade union members are urged not to patronize, there is a well pronounced tendency among some courts to hold this illegal and therefore enjoined.⁷⁹ If the blacklist, the weapon of employers, is held legal, the "unfair list," the analogous weapon of employees, should similarly be made legal. It is difficult to see any substantial difference in principle between the two. What is sauce for the goose is sauce for the gander.

CONCLUSION

In the foregoing discussion it has not been meant to suggest that justice should be reduced to a mere process of mechanics, and that judges should be stripped of all discretionary power. Decisions must and should depend to some extent upon the varying viewpoints of individual judges. But the play of judicial discretion should be confined within fixed limits. The decision of a conspiracy or a boycott case should be controlled by fixed and ascertainable legal doctrines, and not left to the unguided reactions of individual judges, no matter how able or high minded the individuals may be. In no other field of law is this so vitally important as in the settlement of labor disputes. No other cases involve questions fraught with such strong preconceptions and prejudices and yet, because of their social repercussions, of such intense practical and nation-wide importance. Here if anywhere the law should be clear, well understood, definite. Yet in no other field of law today is there so much uncertainty, so many ill-defined or undefined doctrines, such wide latitude for the play of social prejudice or economic bias. The very statement of the problem shows the danger. Past experience has shown that the courts if left to themselves will not cure the difficulty. Carefully framed legislation is necessary.

Labor should not be led to believe that the winning of the Shipstead Anti-Injunction Bill will mean for it adequate protection in the courts. Such a belief spells only disillusionment and resulting social disorder. The problem goes very much deeper than the mere injunction evil. What is necessary is an intensive study of the substantive law, as well as of abuses in procedure, by local groups in every state, and as a result of such study, and growing out of it, carefully drafted bills framed to meet the situation and needs in each state.⁸⁰ Such legislation

⁷⁹ Cf. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 437, 31 Sup. Ct. 492, 496 (1911); *Lawlor v. Loewe*, 235 U. S. 522, 534, 35 Sup. Ct. 170, 172 (1915).

⁸⁰ This was the course followed by the Massachusetts State Branch of the American Federation of Labor in the fall of 1928. A small group was appointed to study intensively the legal problems arising in Massachusetts; and as a result of this study a constructive program was formu-

must be sought in Congress as well as in state legislatures, and there, too, it should cover abuses in the substantive as well as in the procedural law, so far as the matter falls within federal jurisdiction.

Only thus can the problem be successfully met. And it is of importance for all to remember that it is more than a mere problem of law. It is a profound social problem as well; and it demands determined and constructive effort on the part of all who believe in the reign of law and who care for the maintenance of American traditions.

lated, and with the help of expert legal advice a very carefully drawn bill was prepared.